

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER MORGAN,

Defendant-Appellant.

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UNPUBLISHED  
February 22, 2007

No. 265288  
Wayne Circuit Court  
LC No. 05-003760-01

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

After a jury trial, defendant Walter Morgan was convicted of one count of assault with intent to commit murder, MCL 750.83, one count of felon in possession of a firearm, MCL 750.224f, one count of assault with a dangerous weapon (“felonious assault”), MCL 750.82, and one count of possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b. Defendant was sentenced to concurrent terms of 7 to 15 years’ imprisonment for the assault with intent to commit murder conviction, two to five years’ imprisonment for the felon in possession of a firearm conviction, and two to four years’ imprisonment for the felonious assault conviction, and a consecutive term of two years’ imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. Facts

Defendant’s daughter, Charlotte Morgan, was in a relationship with Anthony Robinson. The couple had three daughters. Charlotte and her daughters lived with Elise Morgan, Charlotte’s mother and defendant’s ex-wife. Defendant periodically lived at Elise’s home, and was living there at the time in question. Robinson also periodically lived at Elise’s home.

On the evening of March 24, 2005, while at Elise’s home, Charlotte and Robinson had an argument concerning money that Charlotte had spent to purchase Easter clothing for her daughters; Robinson wanted to use the money to pay for repairs to his car. Apparently, Robinson had a history of striking Charlotte during heated arguments. When the argument escalated, defendant and Charlotte’s brother, Jemel, intervened and forced Robinson to leave the house. Robinson threatened to return and drove away.

Approximately 20 minutes later, Robinson returned and parked his car down the street from Elase's home. He then walked to Elase's home on foot.<sup>1</sup> Elase noticed him approaching and screamed that Charlotte and their daughters were not at the house.

At this time, Elase's son tried to sneak Robinson's two oldest daughters (aged five and seven) from Elase's home to a house across the street. Robinson saw Elase's son and his daughters in the street. He grabbed his daughters. Although they cried and resisted, he walked them toward his car. Charlotte, watching these events from an upper-level balcony of Elase's home, screamed that Robinson was taking her children.

At this point, defendant confronted Robinson in the street and told him to release the girls. Defendant was carrying a shotgun.<sup>2</sup> Robinson refused and held his daughters to avoid being shot. Defendant fired two shots in the ground, but Robinson still refused to release his daughters. Defendant then shot Robinson in the leg. Robinson fell to the ground, releasing his hold on his daughters. An older cousin of the girls was in a car nearby. The girls entered her car and she drove them away from the scene. As the girls escaped, defendant approached Robinson and shot him in the back.

Defendant then went to a neighbor's house, where the police located him. Defendant did not deny his involvement in the shooting. The parties stipulated that defendant had a prior felony record and could not possess a gun.

## II. Double Jeopardy

Defendant argues that his convictions for assault with intent to commit murder and felonious assault, arising from the same incident, constituted double jeopardy. We disagree. Because defendant failed to preserve this issue, we review it for plain error affecting defendant's substantial rights. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

The United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). The double jeopardy clause protects a defendant from both multiple prosecutions and multiple punishments for the same offense. *Herron, supra* at 599. The purpose of this prohibition is to prevent a court from imposing a greater sentence than that intended by the Legislature. *Hawkins v Dep't of Corrections*, 219 Mich App 523, 526; 557 NW2d 138 (1996).

"The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*,

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<sup>1</sup> Apparently, Robinson was known to carry a handgun. Some witnesses testified that Robinson held a handgun as he approached the house. Robinson denied having a weapon on him at the time of the incident.

<sup>2</sup> None of the witnesses in this case observed Robinson carrying a firearm when he walked his daughters to his car.

267 Mich App 141, 147-148; 703 NW2d 230 (2005) (citations and internal quotations omitted). “The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999), quoting *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

This Court has recognized, “[t]here is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other.” *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002), quoting *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995). In this case, the offense of felonious assault was completed before the offense of assault with intent to commit murder occurred. Defendant committed felonious assault when he pointed the gun at Robinson and then shot twice at the ground to scare him. Defendant committed assault with intent to commit murder when he shot Robinson twice, once after the children were released. Because defendant’s convictions resulted from two separate actions, no double jeopardy violation occurred.<sup>3</sup>

### III. Sufficiency of the Evidence

#### A. Assault with Intent to Commit Murder/Felony-Firearm

Defendant argues that the prosecution presented insufficient evidence to establish that he committed assault with intent to commit murder and felony-firearm. We disagree. We review claims of insufficient evidence de novo to determine whether a rational factfinder could have concluded that the prosecution proved all elements of the crime beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). Direct and circumstantial evidence is viewed in the light most favorable to the prosecution. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002). “It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *Id.* at 428.

As stated *supra*, “[t]he elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *Brown, supra* at 147-148 (citations and internal quotations omitted). Our Supreme Court noted,

By saying, however, that . . . the intent to kill must be proved, we do not intend to say it must be proved by direct, positive, or independent evidence; but as very properly remarked . . . in *People v Scott*, 6 Mich [287 (1859)], the jury “may draw the inference, as they draw all other inferences, from any facts in evidence which to their minds fairly prove its existence.” And in considering the question they may, and should take into consideration the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were

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<sup>3</sup> Because we find that defendant’s convictions for assault with intent to commit murder and felonious assault did not constitute double jeopardy, we need not address whether defendant waived appellate review of this issue.

apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made. [*People v Taylor*, 422 Mich 554, 567-568; 375 NW2d 1 (1985), quoting *Roberts v People*, 19 Mich 401, 415-416 (1870).]

“Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient” to establish defendant’s intent to kill. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

A defendant is entitled to claim that he acted in self-defense if, at the time of the offense, “he honestly and reasonably believe[d] that he [was] in imminent danger of death or great bodily harm and that it [was] necessary for him to exercise deadly force.” *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). Similarly, a defendant may use deadly force in defense of another. *People v Kurr*, 253 Mich App 317, 321; 654 NW2d 651 (2002). However, acting in self-defense or in defense of another “requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat.” *Riddle, supra* at 119. “A defendant is not entitled to use any more force than is necessary to defend himself.” *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

From the evidence presented at trial, a reasonable juror could conclude that defendant assaulted Robinson, that he intended to kill him, and that if Robinson had died, defendant’s actions would have constituted murder. Further, a reasonable juror could conclude that defendant did not act in self-defense or in defense of another. Although the evidence presented at trial indicated that Robinson was not holding a gun when he walked his daughters to his car, defendant still shot Robinson twice. Notably, defendant shot Robinson in the back after Robinson released his hold on his daughters and was lying in the street. A reasonable juror could infer that defendant wanted to kill Robinson and was not acting solely to rescue his grandchildren. Accordingly, the prosecution presented sufficient evidence to establish that defendant committed assault with intent to commit murder.

Further, the prosecution presented sufficient evidence to establish defendant’s felony-firearm conviction. A defendant commits felony-firearm when he “carries or has in his . . . possession a firearm when he . . . commits or attempts to commit a felony . . .” MCL 750.227b. Defendant admitted in his statements to the police that he carried a gun at the time of the events giving rise to his felony conviction, and witnesses testified that defendant had a gun. Because the prosecution presented sufficient evidence to find defendant guilty of assault with intent to commit murder, this offense may serve as the underlying felony for the felony-firearm conviction. *People v Guiles*, 199 Mich App 54, 58; 500 NW2d 757 (1993).

#### B. Felon in Possession of a Firearm/Felony-Firearm

Defendant argues that the prosecution presented insufficient evidence to sustain his convictions for felon in possession of a firearm and felony-firearm. We disagree. A person convicted of a felony “shall not possess, use, transport, sell, purchase, carry, ship, receive, or

distribute” a firearm in Michigan until three years after he has paid all fines for the violation, served all prison terms for the violation, and completed all conditions of probation or parole for the violation. MCL 750.224f(1). If the defendant was convicted of a “specified felony,” this probationary period is five years. MCL 750.224f(2)(a). Included in the list of specified felonies is a felony in which an element is the “unlawful possession or distribution of a firearm.” MCL 750.224f(6)(iii).

Both parties stipulated that, for the purpose of the felon in possession of a firearm charge, defendant had a prior felony record and was ineligible to possess a gun. The charge itself indicated that defendant had been convicted of a “specified felony,” namely, carrying a concealed weapon, and that the requirements for regaining eligibility had not been met. If a defendant’s counsel stipulated an element of a charge, a defendant may not argue on appeal that the opposing party presented insufficient evidence to establish that charge. *People v Kremko*, 52 Mich App 565, 575; 218 NW2d 112 (1974). This stipulation adequately signified that defendant had committed a “specified felony” and was ineligible to possess a gun.

The only remaining element for the jury to decide was whether defendant possessed a gun at the time of the incident. As discussed *supra*, the prosecution presented sufficient evidence to establish that defendant possessed a gun during the incident giving rise to his felony convictions. Accordingly, the jury had sufficient evidence to conclude beyond a reasonable doubt that defendant was guilty of the offense of felon in possession of a firearm. Further, this offense could serve as the underlying felony for the felony-firearm conviction. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003).

Affirmed.

/s/ Donald S. Owens  
/s/ Janet T. Neff  
/s/ Helene N. White